

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

July 9, 2002

GSBCA 15756-RELO

In the Matter of ADIL F. KHAN

Adil F. Khan, Huntsville, AL, Claimant.

Deidre W. Gray, Chief, PCS Division, Defense Finance and Accounting Services,
Department of Defense, Columbus, OH, appearing for Department of Defense.

BORWICK, Board Judge.

The Defense Contract Management Agency (DCMA), relying on the "tainted day" rule, denied claimant Adil F. Khan reimbursement of temporary quarters subsistence expenses (TQSE) authorized pursuant to claimant's permanent change of station (PCS). The agency asserts that the meal portion of the reimbursement voucher submitted by claimant was fraudulent and that application of the "tainted day" rule, which results in forfeiture of the entire voucher, is appropriate. We conclude that the agency has not borne its burden of showing that claimant acted with fraudulent intent in seeking reimbursement for his meals. The entire voucher is not forfeited and the agency must pay claimant the undisputed cost of his lodging. Claimant is not entitled to reimbursement of meal costs during the claimed TQSE period because the claimant has not substantiated the cost of meals.

The facts as indicated by the record are as follows. Claimant, a General Engineer with the DCMA, relocated from duty in Boston, Massachusetts, to Huntsville, Alabama, pursuant to agency travel authorization PCS-01-055 dated March 13, 2001. For claimant's PCS, the agency authorized sixty days of TQSE reimbursement using the actual expense method for claimant, his spouse, and three children, each of whom was under twelve years of age.

This move was claimant's first PCS relocation. For assistance, the agency gave claimant a relocation pamphlet which advised in pertinent part:

The actual subsistence expenses incurred must be itemized daily You are reimbursed for the allowable "actual" expenses incurred by yourself and your dependents, **NOT TO EXCEED** the maximum rates, provided the expenses are reasonable as to amount and can be substantiated.

From April 6 to May 5, 2001, claimant completed his first thirty days of temporary quarters. On May 6 claimant submitted a travel voucher for that period claiming \$5808.70 as TQSE. The voucher included lodging expenses of \$19.97 per night and the rest for meal expenses. Claimant did not claim his actual meal expenses on the voucher. Instead, claimant determined what his maximum daily TQSE payment would be. Claimant calculated he would be entitled to a maximum per diem payment rate of \$85 for himself, \$63.75 for his wife, and \$42.50 for his children, or a total of \$191.25.¹ Claimant subtracted his daily lodging payment of \$19.97 to arrive at a figure of \$171.28. He then wrote figures for breakfast, lunch and dinner expenses that would total close to \$171 and entered those meal figures on the reimbursement voucher. For example, for April 6 through April 11, 2001, claimant sought daily meal expense reimbursement of \$172, \$175.40, \$171.40, \$173.50, \$172.30, and \$171.20, respectively.

On May 16, a Defense Finance and Accounting Service (DFAS) official called claimant and questioned the basis of his request for meal reimbursement. The agency states that claimant told this official that he and his family ate at commercial establishments and always paid in cash instead of charging the meals on a credit card. According to the agency, claimant maintained that the meal expenses claimed were based on actual costs, with one quarter of the costs representing claimant's actual cost for meals and three quarters representing his family's actual cost for meals. Claimant does not deny having a conversation with this official on May 16, but denies the substance of the conversation, particularly that the meals represented the actual costs for himself and his family.

On May 21, the claimant's voucher was forwarded to DCMA Criminal Investigations for investigation of alleged inflated meal costs. On June 6, claimant submitted another voucher for his second thirty days of TQSE, from May 5 through June 4. Claimant sought \$599 for the lodging portion of his TQSE and \$4256.75 for meal expenses. This voucher was also forwarded to DCMA Criminal Investigations.

On July 12, a DCMA criminal investigator interviewed claimant. Claimant admitted that he had worked backwards from a calculated maximum daily entitlement to arrive at individual meal costs reflected on his reimbursement vouchers. Claimant explained that he did not understand how to claim TQSE reimbursement and that he thought while he was occupying temporary quarters he was entitled to reimbursement for meals based on a fixed daily rate the same as if he were on temporary duty.²

On August 3, 2001, DCMA Criminal Investigations determined that, in submitting his TQSE vouchers, claimant had violated the False Claims Act, 18 U.S.C. § 287 (2000), and had submitted a false statement in violation of 18 U.S.C. § 1001. On September 24, having

¹ Claimant miscalculated his potential maximum daily entitlement, since he calculated the maximum daily rate for himself, his spouse, and only one child instead of his three children as permitted by the Joint Travel Regulation. JTR C13225-A2. His potential maximum daily entitlement for himself, his spouse, and his three children would have been \$276.25. Id.

² See JTR C4553-A and C4553-C.2 for a description of the "lodgings-plus" per diem method which prescribes fixed-rate reimbursement for meals and incidental expenses.

reviewed the DCMA Criminal Investigations Report of Investigations (ROI), the agency denied reimbursement of claimant's vouchers. The agency advised claimant that he had submitted false statements and that based upon the "tainted day" rule a false statement for any subsistence "taints the entire subsistence claim for that day." Because the agency considered "each day" of voucher suspect, it denied reimbursement entirely. The agency also demanded that claimant return the outstanding balance of his travel advance.

Claimant appealed the agency's determination to this Board, stating:

My meal claims were not correct because I had the misunderstanding that the amount authorized for myself and my family are fixed rate and I will get that amount. I got this misunderstanding because it is written in PCS instructions that I don't need to have any receipt if I claim not more than my authorization. . . . I was 100 percent sure I am claiming my meals correctly by claiming my meal by authorize [and] amount. I made this mistake out of misunderstanding and not knowing and it was a honest mistake.

In a supplemental submission claimant states:

I claimed my meal claim out of misunderstanding and not knowing and not with the intention to cheat in any shape or form. This was my first time to claim like this, it was impossible for me to claim my meal amount the way DFAS expected me to do without any kind of help or experience or training in PCS claiming. DFAS never gave me a chance to correct my mistake in-fact it tried to hide from me my mistakes and ordered a criminal investigation without letting me know why they have ordered investigation, even the investigator never told me why I am investigated.

By invoking the "tainted day" rule, the agency charges claimant with fraud sufficient to work forfeiture of all claims for TQSE for the days in question. The "tainted day" rule is closely tied to the forfeiture statute-- 28 U.S.C. § 2514 (2000)³. Kenneth R. Gould, GSBCA 15527-RELO, 01-2 BCA ¶ 31,566; Department of the Air Force, 61 Comp. Gen. 399 (1982). The elements of fraud to maintain a forfeiture under that statute are (1) a knowing submission of a false claim and (2) an intent to deceive the Government by submitting the false claim. Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998); Crane Helicopter Services, Inc. v. United States, 45 Fed. Cl. 410, 430 n. 25 (1999). These elements should be carefully considered by an agency before invoking the "tainted day" rule.

To successfully invoke the "tainted day" rule, an agency must show "reasonable suspicion of fraud supported by evidence sufficient to overcome the usual presumption of honesty and fair dealing on the part of the claimant." Christine Griffin, GSBCA 15818-

³ That statute provides that "a claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." 28 U.S.C. 2514 (2000).

RELO (May 20, 2002); Floyd S. Wiginton, GSBCA 15583-RELO, 01-2 BCA ¶ 31,605; Gould; Department of the Air Force, 57 Comp. Gen. 664, 668 (1978). The agency evidence must support a reasonable suspicion that claimant knowingly submitted a false claim with intent to deceive.

Here, the agency has established that claimant's meal itemization on his voucher was untruthful. It has not shown, however, that in submitting the vouchers, claimant acted with knowledge that his claim was false or that he acted with intent to deceive the Government. We credit claimant's explanation that he misunderstood the meaning of the regulations governing reimbursement of TQSE and therefore had no intent to deceive. Claimant thought that he was entitled to the maximum daily rate for each day of TQSE and that the listing of the meals was merely a means towards that end. Thus we cannot say that the agency has good reason to suspect that claimant knowingly submitted a false claim.

In rejecting claimant's explanation of a mistake as a defense to the agency's use of the "tainted day" rule, the agency points to claimant's professional position and what it assumes to be the clear meaning of the pamphlet concerning TQSE entitlements distributed to agency employees. These arguments are not persuasive. English is not claimant's native language and his submissions to this Board establish that he is unskilled in the nuances and subtleties of this language. We can understand that he might not extract the precise meaning of the pertinent regulation or the pamphlet the agency had distributed. Claimant even miscalculated what his total maximum daily rate would have been. Claimant had never before claimed TQSE and it appears that no one from the agency explained to him simply and clearly the extent of his TQSE entitlement or precisely how to claim the entitlement correctly. Although we respect the agency's desire to hold its employees to the highest ethical and moral standards, this record does not support the serious charge of fraudulent action.

That does not end the matter. TQSE reimbursement is made after the actual total amount of allowable expenses incurred for each day of a thirty-day period is compared to the maximum allowable amount. The lesser is paid. JTR C13215-A.1. TQSE reimbursement is limited to actual expenses incurred, up to the maximum authorized, provided the expenses are directly related to temporary quarters occupancy, are reasonable in amount, and are substantiated. JTR C13215-A.2.

Claimant is not entitled to reimbursement for the claimed meal expenses because he has not substantiated that the claimed costs were his actual expenses. However, claimant is entitled to be reimbursed lodging expenses. The only reason the agency denied claimant reimbursement for lodging was the application of the "tainted day" rule; the agency does not dispute that claimant sought the actual cost of lodging on his vouchers.

The claim is granted to the extent indicated above.

ANTHONY S. BORWICK
Board Judge